# Khaw Cheng Poon & Ors v Khaw Cheng Bok & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO P–02–360 OF 1998 AND P–02–409 OF 1998

GOPAL SRI RAM, ARIFFIN JAKA JJCA AND ABDUL WAHAB BIN PATAIL J

20 OCTOBER 2004

*Succession — Estate — Direction to return all money and properties removed from estate — Order made for benefit of estate*

*Succession — Estate — Order for exemplary damages — Whether there was evidence to show any profit having been made from money and properties removed from estate*

*Succession — Will — Execution — Validity of wills — Test of formal validity — Whether all formal requirements had been attended to in making of wills — Wills Act 1959 s 5*

There were two appeals. These appeals had to do with the estate of the late Datuk Khaw Bian Cheng ('the deceased'). The subject matter of the appeals concerned two sets of wills, one set of three made on 24 October 1990 (the'1990 Wills') and another set of three wills made on 3 August 1992 (the'1992 Wills'). The appellants in the first appeal were the defendants and the respondents were the plaintiffs. The appellants in the second appeal were interveners. The appellants in the second appeal sought an order that the deceased died intestate. In other words, they sought to have both the 1990 and the 1992 Wills declared invalid. In the court below, the learned judge held the 1990 Wills to be valid but struck down the 1992 Wills. The following issues were canvassed for determination. First, whether the learned judge was right in holding that the 1990 Wills were valid. Second, whether the learned judge was right in striking down the 1992 Wills. Third, whether the learned judge was correct in making the orders in what has been termed the recovery action. Fourth, whether the learned judge was right in awarding exemplary damages.

**Held**, dismissing the appeals:

(1) It was not in dispute that at or about the time the 1990 Wills were made, the deceased had some psychiatric problems. However, in the making of the 1990 Wills, all the formal requirements had been attended to. When the learned judge's judgment was read as a whole it was apparent that he kept the test in *Re R deceased* (1951) P 10 at the forefront of his mind when evaluating the evidence relied on as constituting suspicious circumstances. There was therefore no misdirection on this part of the case (see para 9).

(2) The 1992 Wills failed the test of formal validity. There could be no dispute on the proved and admitted facts, that the witness that witnessed the 1992 Wills did so in the absence of the deceased. This plainly did not meet the requirement of s 5 of the Wills Act 1959 (see para 11 and 12).

(3) It must not be forgotten that very serious allegations were levelled against the first appellant. It was incumbent on him to have gone into the witness box to repel the case put against him. He did not do that. His failure to testify was commented on unfavourably by the learned judge and this court did not find any misdirection in this respect. It was difficult to see how in the absence of an explanation from first appellant that the learned judge could have made any findings other than the one he made (see para 15 and 17).

(4) The judge having found first defendant and his sons had removed money and properties belonging to the estate made orders to achieve *restitutio in integrum*. The order was made for the benefit of the estate. There was no merit in the complaint of the appellants in the first appeal that they were being required to make payments received by a third party (see para 19 and 20).

(5) There was no evidence to show any profit having been made. Exemplary damages are only awarded in very special circumstances. These circumstances are contained in the speech of Lord Devlin in *Rookes v Barnard* [1964] AC 1129. That no new categories are admissible to the Devlin list has now been settled in the decision of the House of Lords in *Cassell & Co Ltd v Broome* [1972] AC 1027. The court therefore had no choice but to set aside the award for exemplary damages (see para 26).

[**Bahasa Malaysia summary**

Terdapat dua rayuan. Rayuan-rayuan ini adalah berkenaan dengan hartanah mendiang Datuk Khaw Bian Cheng ('si mati'). Perkara subjek bagi rayuan-rayuan ini berkenaan dengan dua set wasiat. Satu set yang mengandungi 3 wasiat dibuat pada 24 Oktober 1990 ('wasiat 1990') dan satu set bertiga lagi dibuat pada 3 Ogos 1992 ('wasiat 1992'). Perayu dalam rayuan pertama adalah defendan dan responden adalah plaintif. Perayu dalam rayuan kedua adalah pencelah. Perayu dalam rayuan kedua memohon satu perintah bahawa si mati meninggal dunia tanpa meninggalkan wasiat. Dalam kata lain, mereka memohon untuk satu perintah yang menyatakan bahawa kedua-dua Wasiat 1990 dan 1992 adalah tidak sah. Dalam mahkamah di bawah, yang arif hakim memutuskan bahawa wasiat 1990 adalah sah tetapi telah membatalkan Wasiat 1992. Isu-isu berikut dikemukakan untuk penentuan. Pertama, sama ada yang arif hakim adalah betul dalam menyatakan bahawa Wasiat 1990 adalah sah. Kedua, sama ada yang arif hakim betul dalam membatalkan Wasiat 1992. Ketiga, sama ada yang arif hakim betul dalam membuat perintah dalam apa yang dikatakan

sebagai tindakan pemulihan (recovery action). Keempat, sama ada yang arif hakim betul dalam memberi award gantirugi teladan.

**Diputuskan**, menolak rayuan-rayuan itu:

(1) Tidak dipertikaikan bahawa pada atau sekitar Wasiat 1990 dibuat, si mati mempunyai masalah psikiatrik. Walau bagaimana pun, semasa membuat Wasiat 1990, semua kehendak rasmi telah dipenuhi. Apabila penghakiman yang arif hakim dibaca secara keseluruhannya, adalah jelas bahawa yang arif telah mengingati ujian dalam *Re R deceased* [1951] P 10 semasa menilai keterangan yang digunakan sebagai merupakan keadaan yang meragukan. Oleh tiada salah arah dalam hal ini (lihat perenggan 9).

(2) Wasiat 1992 gagal dalam ujian sah rasmi. Tiada pertikaian dalam fakta yang dibuktikan dan diakui, iaitu saksi bagi Wasiat 1990 menjadi saksi wasiat itu tanpa kehadiran si mati. Ini secara jelas tidak menepati kehendak s 5 Akta Wasiat 1959 (lihat perenggan 11 dan 12).

(3) Tidak boleh dilupakan bahawa tuduhan yang sangat serius telah dibuat terhadap perayu pertama. Adalah wajib ke atas beliau untuk memasuki kandang saksi untuk menyangkal kes yang dinyatakan terhadapnya. Beliau tidak berbuat demikian. Kegagalan beliau untuk memberi keterangan telah diberi perhatian dan tidak dipersetujui oleh yang arif hakim dan mahkamah tidak menemui sebarang salah arah dalam hal ini. Adalah susah untuk melihat bagaimana tanpa sebarang penjelasan daripada perayu pertama yang arif hakim boleh membuat sebarang keputusan selain yang telah dibuatnya (lihat perenggan 15 dan 17).

(4) Yang arif hakim apabila mendapati defendan pertama dan anaknya telah memindahkan wang dan harta yang dimiliki dalam hartanah, telah membuat perintah untuk mencapai *restitutio in integrum*. Perintah tersebut dibuat bagi kebaikan hartanah tersebut. Tiada merit dalam aduan perayu-perayu dalam rayuan pertama bahawa mereka dikehendaki membuat bayaran yang diterima oleh pihak ketiga (lihat perenggan 19 dan 20).

(5) Tiada bukti yang menunjukkan sebarang keuntungan telah dibuat. Gantirugi teladan hanya diberikan dalam kes-kes istimewa. Keadaan-keadaan ini terdapat dalam ucapan Lord Devlin dalam *Rookes v Barnard* [1964] AC 1129. Tiadanya kategori baru yang boleh diterima bagi senarai Devlin tersebut telah diselesaikan dalam keputusan House of Lord dalam *Cassell & Co Ltd v Broome* [1972] AC 1027. Mahkamah oleh itu tiada pilihan kecuali untuk mengetepikan award gantirugi teladan (lihat perenggan 26).]

**Notes**

For a case on estate generally, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2185.

For cases on execution of will, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2503–2509.

**Cases referred to**

*Cassell & Co Ltd v Broome* [1972] AC 1027 (folld)
*Clarke v Edinburgh Tramways Co* 1919 SC (HL) 35 (refd)
*R, deceased; Re* (1951) P 10 (folld)
*Rookes v Barnard* [1964] AC 1129 (folld)
*Trengganu State Economic Development Corporation v Nadefinco Ltd* [1982] 1 MLJ 365 (refd)
*Wallersteirner v Moir (No 2)* [1975] QB 373 (refd)

**Legislation referred to**

Wills Act 1959 s 5

**Appeal from**: Civil Suit No 22–63 of 1995 (High Court, Pulau Pinang)

*Lim Chee Wee (Harold Tan with him) (Skrine) for the appellants in Civil Appeal No P–02–360 of 1998 and the 14th–16th respondents in Civil Appeal No P–02–409 of 1998.*

*N Chandran (E Ramasamy Rajan Chandran, Roy Etican and Ivan Ang with him) (E Ramasamy & Co) for the first respondent in Civil Appeals No P–02–360 of 1998 and P–02–409 of 1998.*

*John Khoo Boo Lai (Mohd Ismail bin Mohamed with him) (Ismail Khoo & Associates) for the second–fifth and ninth–13th respondents in Civil Appeal No P–02–360 of 1998 and P–02–409 of 1998.*

*Shyamala Devi (Hussein & Co) for the sixth–eighth respondents in Civil Appeal No P–02–360 of 1998 and P–02–409 of 1998.*

*JA Yeoh (Shearn Delamore & Co) for the 14th–16th respondents in Civil Appeal NoP–02–360 of 1998 and the appellants in Civil Appeal No P–02–409 of 1998.*

**Gopal Sri Ram JCA** (delivering judgment of the court):

**[1]** This is the judgment of the court.

BACKGROUND AND ISSUES

**[2]** There are two appeals before us, they both arise from three consolidated suits tried at the High Court in Penang. The litigation in these appeals has to do with the estate of the late Datuk Khaw Bian Cheng. The subject matter of the appeals concerns two sets of wills, one set of three made on 24 October 1990, which we will refer to as the '1990 Wills' and another set of three wills made on 3 August 1992, which we will refer to as '1992 Wills'.

**[3]** The appellants before us in the first appeal, Appeal No P–02–360 of 1998, were the defendants in all three suits. The respondents before us were the plaintiffs in those suits. The appellants in the second appeal Appeal No P-02-409 of 1998 intervened in one of those suits, had themselves added as defendants and delivered a counterclaim about which we will say something in a moment. Suffice that we mention now that the appellants in the second appeal are seeking an order that Datuk Khaw Bian Cheng (the deceased) died intestate. In other words, they are seeking to have both the 1990 and the 1992 Wills declared invalid.

**[4]** In the court below, the learned judge held the 1990 Wills to be valid but struck down the 1992 Wills. The appellants in Civil Appeal No P–02–360 of 1998, the first appeal are seeking a reversal of the judge's findings that the 1992 Wills are invalid. The judgment of the learned judge is reported in [1998] 3 MLJ 457. For that reason, we will not rehearse the facts of this case in any detail. All the relevant facts and circumstances of this case have been dealt with admirably by the learned trial judge in his lengthy and carefully written judgment.

**[5]** Before us the following issues were canvassed for determination. First, whether the learned judge was right in holding that the 1990 Wills were valid. The subsidiary issues connected with this question relate to the judge's rejection of the plea of undue influence and suspicious circumstances raised by the appellants in the second appeal. Second, whether the learned judge was right in striking down the 1992 Wills and in the resolution of this issue are involved the learned judge's findings of fraud, undue influence and the existence of suspicious circumstances surrounding the making of the 1992 Wills. Third, whether the learned judge was correct in making the orders in what has been termed the recovery action. These are orders whereby, the learned judge sought to restore to the estate of the deceased monies and properties it had lost. Fourth and last, whether the learned judge was right in awarding exemplary damages. We will deal with each of these issues in turn.

THE FIRST ISSUE: THE 1990 WILLS

**[6]** The facts and circumstances surrounding the making of the 1990 Wills have been dealt with at great length by the learned judge. He came to the conclusion that these wills were valid after a careful and thorough examination of the masses of evidence, both oral and documentary placed before him. For present purposes, it suffices for us to say that the 1990 Wills were drafted by Hamid Merican (PW1) on the instructions given him by the deceased. We find nothing unusual in this given the close friendship that subsisted between these two gentlemen. It is not in dispute that at or about the time the 1990 Wills were made, the deceased had some psychiatric problems. He was receiving treatment for this from Dr Tan Chee Kuan (PW6) who was the deceased's regular medical attendant. Immediately prior to the making of the 1990 Wills

the deceased visited PW6. He wanted to be satisfied that he was mentally fit to make a will. Having had the wills prepared for him, he went along to the offices of Datuk Ghazi Ishak (PW12), a very senior practitioner of the Malaysian Bar. PW12 ascertained that the wills had been read and understood. The formal requirements had been attended to. The appellants in the second appeal had in the court below attacked the 1990 Wills on the ground that it was the product of undue influence. They also said that the making of the will was surrounded with suspicious circumstances. The learned judge rejected these contentions. This is how he did it:

> The circumstances attending the execution of the 1990 Wills, as far as could be judged, were not consistent with them having been procured by undue influence. The deceased was not deceived into making them by fraud or constrained to make them by force, threats or other forms of undue influence. The court is satisfied that there was no undue influence and that there were no circumstances that should excite its suspicion and vigilance. There was no question of fraud, and the fact that the 1990 Wills were read by the capable deceased was conclusive evidence that he knew and approved of the contents, and that presumption had not been rebutted.
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> All things considered, it must be deduced that the deceased understood and approved the provisions of the 1990 Wills.

**[7]** Having read the printed evidence and the judge's discussion of it we agree entirely with the conclusions reached by the learned judge. Before us Mr JA Yeoh attacked these findings of the learned judge. His complaint was his client's case had not been appreciated or sufficiently appreciated in the court below. With respect, we cannot agree with learned counsel. The following passage in the learned judge's judgment puts paid to the submission of counsel:

> It was not undiscerned that Cheng Hum's testimony was more of a ventilation of his anger for his disadvantageous position than of any real complaint of any undue influence in the making of the 1990 Wills. He blamed Cheng Poon for the deterioration beginning 1963 of his relationship with his father. He said that his relationship did not improve but rather got worse because of Cheng Poon's instigation and influence. He said that Cheng Poon was saying that he (Cheng Hum) had no son to carry on the family name. He said his relationship with his parents, up to 1988, did not improve. Next, he blamed Cheng Poon for the sale of his Ayer Itam lands, the RM130,000 paid to Cheng Liat and Cheng Poon, the sale of his lands in Bukit Tengah, Butterworth, the attempts to force him to sell his remaining Ayer Itam lands, the threats to disown him, the attempts to claim back the properties given him, the termination of his monthly allowance and the instruction barring him from Pykett Avenue. He said that his father would not leave him RM20,000 but would have been fair and not leave him much less than his brothers. He believed it was all due to Cheng Poon's instigation. Cheng Poon could influence the deceased and even made decisions for the deceased, he said. Blame was pinned all around. Surprisingly, Cheng Hum uttered not a word that the 1990 Wills were procured by undue influence.

Mr Yeoh exhorted that Cheng Poon's influence over the deceased and the deceased's trust in Hamid were the principal reasons for the 1990 Wills and that the 1990 Wills were not wills of the deceased but were procured by the importunity of Cheng Poon and Hamid. He asserted that deceased fell prey to Cheng Poon's manipulation after the death of Ooi Geen Peen.

The gravamen for that hypothesis was the alleged importunity of Cheng Poon and Hamid. As said, those alleging undue influence must prove it. But there was no evidence that undue influence had been exercised in relation to the 1990 Wills. There was no evidence that the other brothers, either jointly and or severally, had obtained Hamid's help in procuring the 1990 Wills. There was no evidence that importunity, be that of Cheng Poon and or Hamid, had been visited and or inflicted upon the deceased into making the 1990 Wills, or that Cheng Poon was involved in the preparation of the 1990 Wills. There was no evidence, and it was also not shown, that Cheng Poon's influence over his father had been exercised in relation to the 1990 Wills. Hamid testified that only the deceased instructed him to prepare the 1990 Wills and that none of the sons knew of the 1990 Wills. Cheng Bok and Cheng Liat testified that they had no knowledge whatsoever of the preparation and execution of the 1990 Wills. And there was no evidence that Cheng Poon and Hamid had banded together and exerted their respective influence on the deceased.

**[8]** Learned counsel for the appellants in the second appeal also argued that the learned judge had applied the wrong test. He submitted that the learned judge focused on the issue of undue influence but did not judicially appreciate the evidence as constituting suspicious circumstances. Mr Yeoh has taken us through several passages in the evidence which he says are acknowledgments by the respondents in these appeals that there were circumstances which could give rise to a well-grounded suspicion that the will was not that of the deceased. Again we cannot agree. In our judgment the passage quoted above in para 6 deals with this adequately. We also cannot agree that the learned judge applied the wrong test. His Lordship in the course of his judgment referred to the following passage in the judgment of Wilmer J in *Re R, deceased* [1951] P 10 at p 16:

The conclusion I draw from these authorities (*Davis v Mayhew* [1927] P 264; *Low v Guthrie* [1909] AC 278) to which I have referred is that, when it is a question of knowledge and approval of the contents of a will the circumstances which are held to excite the suspicions of the court must be circumstances attending, or at least relevant to, the preparation and execution of the will itself.

**[9]** When the learned judge's judgment is read as a whole it is apparent that he kept this test in the forefront of his mind when evaluating the evidence relied on by Mr Yeoh's client as constituting suspicious circumstances. There is therefore no misdirection on this part of the case.

**[10]** The learned counsel also complains that the learned judge did not address his mind to the several important reliefs sought in the counterclaim of his client. With respect, we think there is nothing in this argument. At the

end of the day, once the learned judge came to the conclusion that the 1990 Wills were valid that was for all practical purposes came the end to Mr Yeoh's clients' case. Any declarations or other ancillary relief that the judge may have been inclined to grant would only have benefited the estate in which these appellants had no interest. For the reasons given, we do not think that any valid complaint could be directed against the judge's approach to the case of the appellants in the second appeal. We would therefore uphold the finding of the learned judge that the 1990 Wills are valid and affirm the orders he made against Mr Yeoh's clients.

THE SECOND ISSUE: THE 1992 WILLS

**[11]** The learned judge's finding in respect of the 1992 Wills was that they were the product of fraud and undue influence. He further held that there were suspicious circumstances surrounding the making of the 1992 Wills which were not dispelled by the appellants in the first appeal. We find it unnecessary to reproduce all those passages in which the learned judge considered the issue at hand. Two matters are quite clear, as pointed out by Datuk N Chandran, common counsel for the respondents in this appeal, the 1992 Wills failed the test of formal validity and it was really unnecessary for the learned judge to have continued with the other issues.

**[12]** There can be no dispute on the proved and admitted facts, that the witness Dr Gafoor (PW2) witnessed the wills in his clinic in the absence of the deceased. This plainly does not meet the requirement of s 5 of the Wills Act 1959. For completeness, that section is now reproduced:

> (1) No will shall be valid unless it is in writing and executed in manner hereinafter mentioned.
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> (2) Every will shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; such signature shall be made or acknowledged by the testator as the signature to his will in the presence of two or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary:
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> Provided that every will shall, as far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid under this section if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and no such will shall be affected by the circumstance:
>
> (a) that the signature shall not follow or be immediately after the foot or end of the will; or
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> (b) that a blank space shall intervene between the concluding word of the will and the signature; or

(c) that the signature shall be placed among the words of the testimonium clause or of the clause of attestation, or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses; or

(d) that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature; or

(e) that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature,

(f) and the enumeration of the above circumstances shall not restrict the generality of this proviso; but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.

**[13]** However, the learned judge did go into the substantive validity of the 1992 Wills and in that process made important findings of fact, some of which warrant reproduction here:

> There was strong and unremitting suspicion that the deceased was deceived into making the 1992 Wills by fraud (in the civil sense) or was constrained to make it by undue influence. Contrary to Mr Koh's contention, the changes to the 1990 Wills were not consistent with the changes related on 3 August 1992 to Dr Tan who testified that the deceased only informed him of the change of trustees. The fact that the deceased had no independent advice, legal or otherwise, and that his other children were kept away was not satisfactorily explained. The radical departure from the 1990 Wills, radical because all changes solely favoured the nuclear family of the person who prepared the 1992 Wills which obviously possessed great influence with the deceased, was not explained. The strong suspicion that the radical changes were not the result of the free volition of the deceased (*Marsh v Tyrell* (1828) 2 Hagg Ecc 84) was not removed.

**[14]** On the point of undue influence, the judge found as follows:

> Even if there was no direct evidence of undue influence, there was more than ample evidence that the deceased was so far under the undue influence of Cheng Poon and his family that a conclusion is warranted that undue influence was exercised in relation to the 1992 Wills (*Boyse v Rossborough* (1857) 6 HLC 2). The circumstances attending the execution were consistent with its having been procured by undue influence. The circumstances were not consistent with any other hypothesis (*Boyse v Rossborough*). The proponents of the 1992 Wills failed to show the righteousness of the transaction or that the 1992 Wills expressed the true will of the deceased (*Finny v Govett* (1908) 25 LTR 186). All said, the circumstances attending the execution were that suspicious that even if undue influence was not proved, but it was, the court is not satisfied as to the righteousness of the transaction (*Barry v Butlin* (1838) 2 Moo PC 480; *Fulton v Andrew* (1875) LR 7 HL 448; *Re Hartley*.

*Hartley v Fuld (Tuld intervening) (No 3)* [1965] 3 All ER 776). Howard who prepared the Wills under which he and his family took their extraordinary bounty and assumed all power failed to substantiate the truth, honesty and righteousness of the 1992 Wills (*Fulton v Andrew*). Howard failed to give clear proof that the deceased knew and approved of that part under which he and his family took their extraordinary benefits (*Hegartv v King* (1880) 5 LR Ir 249, 7 LR Ir 18 affd). 'This means that … the issue (substantial validity) must be found against (Cheng Poon, Richard and Howard)' (*Barry v Butlin*).The 1992 Wills purporting to be executed by the deceased have no validity whatsoever and cannot be admitted to probate.

**[15]** It must not be forgotten that very serious allegations were levelled against the first appellant, Khaw Cheng Poon. It was incumbent on him to have gone into the witness box to repel the case put against him. He did not do that. His failure to testify was commented on unfavourably by the learned judge and we do not find any misdirection in this respect.

**[16]** For principle and authority, we need go no further than to quote the following passage from Sarkar's *Law of Evidence* (15th Ed) at p 1686:

> Presumptions are necessarily made against parties who having a knowledge of the facts in dispute will not subject themselves to examination, when a *prima facie* case is made against them, and when by their own evidence, they might have answered it (*Nawab Syed v Amanee*, 19 WR 149 PC pp 150–51. See also *Sabbaji v Shidappa* 26 B 392 in which the circular order of the Bombay High Court dated 31 September 1900 was referred). The Judicial Committee observed: 'Under such circumstances it is impossible to overlook the significance attaching to the refusal of the respondents and their son Jot Singh to enter the witness-box. It raises a presumption against them' (*Durga v Mathura* 15 CWN 717, 721-22 10 1C 963 PC].'

**[17]** It is difficult to see how in the absence of an explanation from Khaw Cheng Poon that the judge could have made any findings other than the one he made. We remind ourselves that the issues raised in this case such as fraud, undue influence, the existence of suspicious circumstances are all essentially questions of fact. Our function as an appellate court on appeals such as the present have been discussed in a number of cases. By far, the leading case on the subject is *Clarke v Edinburgh Tramways Co* 1919 SC (HL) 35. In that case, Lord Shaw of Dunfermline had this to say:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man

who saw and heard them which can never be reproduced in the printed page. What in such circumstances, this psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without these advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

**[18]** We must recognise our lack of the audio visual advantage enjoyed by the learned judge. This is not a case where that advantage has not been availed of by the primary trier of fact. Quite the contrary. For the reasons already given, we would therefore uphold learned judge's finding that the 1992 Wills were invalid. That brings us to the third issue.

THE THIRD ISSUE: THE RECOVERY ORDERS

**[19]** The learned judge having found that the first defendant and his sons had removed money and properties belonging to the estate made orders to achieve *restitutio in integrum*. The orders about which complaint is made are the following:

(i) that the estate do deduct the sum of RM577,000 (being RM225,000, RM39,000, RM182,000, RM31,000 and RM100,000) from Howard's interests and the sum of RM131,000 (being RM31,000 and RM100,000) from Gim Chuan's interests, in Khaw Bian Cheng Sdn Bhd; and

(ii) that Cheng Poon and Richard do pay the Estate the sum of RM255,000 received by Bok Eng.

**[20]** The complaint in respect of (i) is that Howard Khaw was not a party to the recovery action and therefore no order could be made against him. Inthis regard, we accept Datuk Chandran's submission that the order is not directed against Howard Khaw but merely is made for the benefit of the estate. As can be seen from a plain reading of the order, Howard Khaw is not required to do anything or act, neither is he required to make any payment. We do not find it necessary to go any further than that to uphold the first order above and to reject Mr Lim Chee Wee's argument in that regard.

**[21]** With regards to (ii), there is really no merit in the complaint of the appellants in the first appeal that they were being required to make payments received by a third party, namely Khaw Cheng Poon's wife, Lim Bok Eng. The answer is found in the following passage in Bogert's work *Trusts* (6th Ed) at p 558:

> It is elementary that a trustee who commits a breach of trust can be required to pay from his own pocket the damages caused to the trust beneficiaries. He can be compelled to replace the trust property lost by his wrongdoing and if he does not comply with the direction to make restoration a judgment can be collected out of his personal assets. A failure to perform any of the duties placed upon him by common law, statute or trust instrument, if loss is caused thereby, will give the beneficiaries, a co-trustee or a successor trustee a right to secure from the court of equity a decree that the wrongdoing trustee pay into the trust fund the amount of damages suffered.

**[22]** So too here. The respondents, Khaw Cheng Poon and Richard Khaw had by their own dishonesty secreted away for their own use and benefit monies and properties belonging to the Estate, including the sum of RM225,000 mentioned in order (ii) above. They must disgorge. That is what the order requires them to do. There is therefore nothing wrong with it.

**[23]** We must now deal with the separate order arising from (i) above. The learned judge required Khaw Gim Chuan to disgorge her interest in the family company. Khaw Gim Chuan was not a party to the proceedings. Noorder could therefore have been made against her. Datuk Chandran, at the very commencement of this appeal through his written submission, had indicated he did not intend to uphold this part of the order. We accordingly discharge it.

**[24]** One final point on the recovery order. Nowhere in his judgment did the learned judge grant any relief in respect of the Porsche car that had to been taken away from Richard Khaw. There is an obvious reason for this. The learned judge found as a fact, which we accept, that the Porsche car was gifted by the deceased to Richard Khaw in the former's lifetime. However, when the order came to be extracted, it included a reference to the Porsche car. That was obviously an error, a slip, made in the course of the preparation of the order. We accordingly direct that part of the sealed order be set aside.

## THE FOURTH ISSUE: EXEMPLARY DAMAGES

**[25]** The judge was justifiably outraged by the conduct of the appellants in the first appeal (first, second and third defendants in the court below). He wanted to give expression to his outrage. He therefore made an award of exemplary damages against the first, second and third appellants of RM500,000. Mr Lim Chee Wee, learned counsel for the appellants, has with his usual ability argued that this award cannot be sustained in principle and authority. In support of his submission, Mr Lim drew our attention to the following passages in the speech of Lord Devlin in *Rookes v Barnard* [1964] AC 1129:

> Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

**[26]** Mr Lim argued that there is not a shred of evidence to show any profit having been made by his clients. We agree with his submission. Exemplary damages are only awarded in very special circumstances. These circumstances are contained in the speech of Lord Devlin to which we have already referred. That no new categories are admissible to the Devlin list has now been settled in the decision of the House of Lords in *Cassell & Co Ltd v Broome* [1972] AC 1027. We therefore have no choice but to set aside the award for exemplary damages.

**[27]** Datuk Chandran has strenuously argued that even if the award of exemplary damages is set aside, the deceased's estate should be compensated by an award of compound interest. The principles governing the amount of compound interest is set out in the leading text on the subject *The Law of Trusts* (4th Ed, Vol 3) by Scott at p 263:

> There is no definite rule on the question whether the trustee is liable for simple interest or for compound interest. Ordinarily, however, he is liable only for simple interest. But if he has actually received compound interest, he is of course accountable for such interest. If he uses trust funds in his own business and it does not appear what return he has received, it has been held in a number of cases that he is chargeable with compound interest, the court holding that there is an inference that he has received a profit at least equal to compound interest. It would seem, however, that if he can show that he did not receive so much, he should not be liable for compound interest. It has also been held that he is liable for compound interest where it was his duty to reinvest interest received by him, as where by the terms of the trust he is directed to accumulate.
>
> In some cases it has been held that he is liable for compound interest wherever he intentionally commits a breach of trust. There is a statutory provision to this effect in some states. In some cases, however, it has been held that the mere fact that the trustee intentionally commits a breach of trust does not of itself render him liable for compound interest.

**[28]** In a gist, it appears from the foregoing passage that whether compound interest would be granted in a particular case, is one where there has been an intentional breach of trust on the facts of the particular case. Datuk Chandran has also drawn our attention to the judgment of Salleh Abas FJ in *Trengganu State Economic Development Corporation v Nadefinco Ltd* [1982] 1 MLJ 365 (at p 369):

> If it is shown that he had made use of it as a working capital for his business or employed it in trade and has presumably earned interest or profits, the measure of compensation is compound interest. In *Wallersteirner v Moir (No 2)* [1975] QB 373, Lord Denning MR quoted with approval the judgment of Lord Hatherley LC in *Burdick v Garrick* (1870) 5 Ch App 233 which is as follows:
>
> > The court presumes that the party against whom relief is sought has made that amount of profit which person ordinarily do make in trade, and in these cases the court directs rests to be made — ie compound interest.

A The sum total of these cases is that interest is not a punishment but a compensation for the party entitled to the money for being deprived of its use and that interest would be simple or at rests depending upon the circumstances of the case. It is simple interest if the accounting party simply keeps it or actually received such rate, but it is compound if the court could infer from circumstances that the money was used in the accounting party's business.

B

**[29]** We have examined the record very carefully and we are unable to find an iota of evidence to suggest that Mr Lim's clients had used the monies in question in their business. Accordingly, we are unable, with respect to accede to Datuk Chandran's submission on this point. We have no alternative but to affirm the order as made by the learned judge. In so doing, we are guided by the principles well-established in our jurisprudence that awards of interest and the rate of such awards are really matters within the discretion of the court of first instance and that they should not be interfered with unless some error in principle is shown. We do not find any appeallable error on the part of the judge as regards to this part of the case.

C

D

COSTS

**[30]** In the court below, the learned judge ordered the first, second and third defendants to bear their own legal costs. He also ordered the fourth and fifth defendants, the appellants in the second appeal before us to recover their costs from the estate. A similar order was made in respect of the respondents before us. We affirm these orders.

E

**[31]** As regards the costs of their appeal, we would make the following orders:

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(a) we direct the first, second and third appellants in the first appeal to pay 90% of the costs of the estate incurred in the prosecution of this appeal;

(b) the costs of the appellants in the second appeal will be taxed and paid out of the estate; and

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(c) the costs of the respondents will also be taxed and paid out of the estate.

**[32]** The deposit paid into court by the appellants in the first appeal shall be paid out to the deceased's estate to account of taxed costs.

H

**[33]** The deposit by the appellants of the second appeal shall be refunded to them.

CONCLUSION

**[34]** This is a particularly difficult case. It involves many issues. It concerns numerous documents and voluminous oral testimony. The task the learned trial judge had to face was Himalayan. He discharged that task admirably. The way in which he has dealt with the issues and findings required of him to be

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made has rendered our task a particularly easy one. So have the arguments of counsels who have presented their submissions to us. But for the assistance we have received from Mr JA Yeoh, Mr Lim Chee Wee and Datuk N Chandran, this extemporary judgment would not have been possible. We must therefore extend our gratitude to them.

**[35]** These appeals will be disposed of in the terms set out above.

*Appeals dismissed.*

Reported by Peter Ling